

DECISION



2844
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-213279

DATE: July 24, 1984

MATTER OF: Essex Associates, Inc.

DIGEST:

1. Solicitation's all-or-none basis for award does not make the protester's bid on certain line items a domestic bid for those items under the Buy American Act (41 U.S.C. §§ 10a-d (1982)). An all-or-none bid cannot be used to characterize bid items clearly foreign as domestic on the ground that those bid items represent less than 50 percent of the total bid.
2. GAO finds that agency unreasonably applied Buy American Act differential to certain line items as integrated units when solicitation indicated that integrated units were composed of different line items. Protest is sustained because applying differential as indicated by solicitation would have made the protester the low evaluated bidder.

Essex Associates, Inc. (Essex), protests the award of a contract under invitation for bids (IFB) No. YA551-IFB3-340045, issued by the Department of the Interior (Interior), Bureau of Land Management. The IFB was a total small business set-aside for windmills, towers, well cylinders and pump rods. Performance under the contract has been completed and all items have been accepted by the government.

Essex claims that a foreign bid differential of 12 percent was improperly added to its low bid under the Buy American Act (41 U.S.C. §§ 10a-d (1982)). According to Essex, the cost of its foreign items represented only 46 percent of its total bid, less than the 50-percent criterion specified by the IFB for determining whether a bid was foreign.

For the reasons set forth below, the protest is sustained.

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Section "E" of the IFB, the bid schedule, listed the bid items as follows:

<u>"Item No.</u>	<u>Supplies/Services</u>	<u>Quantity</u>
1.	TOWER, 27 foot to accommodate 10 foot windmill	5
2.	TOWER, 27 foot to accommodate 8 foot windmill	6
3.	WINDMILL, 10 foot motor, vane assembly to fit item 1 above	5
4.	WINDMILL, 8 foot motor, vane assembly to fit item 2 above	6
5.	WELL CYLINDERS	11
6.	PUMP RODS to fit item 5 above	1,407"

The bid schedule called for the bidders to provide unit prices for the six bid items. However, the IFB also provided that "TOTAL ALL OR NONE" bids were to be submitted by the bidders.

Five bids were received by Interior at bid opening. Essex submitted the aggregate low bid of \$19,875.54. In response to the IFB's Buy American Certificate clause, Essex stated that bid items 3 and 4 were "100% Argentina" made. Essex also stated that the combined amount for these two bid items represented 46 percent of Essex's total bid. Interior found the windmills and towers portion of Essex's bid to be foreign and in accordance with the Foreign Bid Differential clause in section "C" of the IFB added 12 percent to Essex's combined prices for bid items 1 through 4. As a result, Essex's evaluated bid for the six bid items was \$21,829.98. Award was made to Dean Bennett Supply Co., Inc., at \$21,173.73.

Essex contends that, because section "E" of the IFB called for all-or-none bids, award was to be made to one contractor based on the lowest "total price." Essex further

argues that the IFB's Foreign Bid Differential clause specifically provided that a total bid would be considered foreign only if the cost of foreign materials is more than 50 percent of the total bid. Essex therefore takes the position that because its Buy American Certificate stated the cost of foreign materials as 46 percent of the total bid, Interior should not have applied a 12-percent bid differential.

In the alternative, Essex contends that even if its bid was in part foreign, Interior should not have applied the 12-percent differential to Essex's combined bid price for bid items 1 through 4. Essex argues that all six bid items are separately usable. Essex concludes that since bid items 3 and 4 were the only foreign items in its bid, the IFB's 12-percent differential should only have been applied to these two bid items. Essex notes that if Interior had so limited the application of the 12-percent differential, Essex would have been the low bidder.

Interior argues that bid items 1 through 4, towers and windmills, were integrated units and thus constituted a separably usable portion of the total bid. According to Interior, bid item 5, well cylinders, and bid item 6, pump rods, were also separably usable from the towers and windmills. Interior points out that the bid schedule and section "F" of the IFB, Specifications/Description, specified that the towers and windmills were to be constructed to "accommodate" each other. Since the windmills bid by Essex were 100 percent foreign, Interior asserts that their price constituted more than 50 percent of the windmills and towers portion of Essex's bid. Interior therefore takes the position that the bid item 1 through 4 portion of Essex's bid was foreign.

An all-or-none bid cannot be used collectively to characterize bid items which are clearly of foreign origin as domestic merely because the items represent less than 50 percent of the total bid. See 47 Comp. Gen. 676 (1968). Since Essex's Buy American Certificate expressly stated that the windmills it would supply were 100 percent foreign made, Essex's bid was at least foreign for those two bid items.

The essential question is whether Interior should have applied the 12-percent foreign bid differential factor to Essex's prices for IFB bid items 1 through 4 combined. The Federal Procurement Regulations (FPR), 41 C.F.R. § 1-6.104-4(b) (1983), provide that where individual bid items being procured under a single solicitation bear such

an interrelationship with each other, they may be evaluated together for purposes of the Buy American Act. See Imperial Eastman Corporation, Thorsen Tool Company, 53 Comp. Gen. 726 (1974), 74-1 CPD 153. As noted by Interior, the IFB's bid schedule and specifications clearly stated that the windmills and towers were to accommodate each other. Moreover, paragraph 13(a) of section "C" of the IFB provided that a total bid, an article separably usable and covered by an individual bid item, or a single unit of a multiunit item if separably usable would be considered foreign if the cost of the foreign materials was more than 50 percent of the total bid, bid item, or unit, respectively.

While the IFB did not specifically designate the windmills and towers as multiunit bid items, we find that it was reasonable for Interior to treat the towers and the corresponding 8- or 10-foot windmills as integrated units in applying the Buy American Act. See Dubie-Clark Company Patterson Pump Division, B-189642, February 28, 1978, 78-1 CPD 161. However, we disagree with Interior's consideration of the towers and both sizes of windmills as one single integrated unit in determining whether Essex's bid was foreign in part. Since the IFB specified that bid item 1, five 27-foot towers, was to accommodate bid item 3, 10-foot windmills, and that bid item 2, six 27-foot towers, was to accommodate bid item 4, 8-foot windmills, we find that at the very least there were two separate integrated tower and windmill units.

Furthermore, we question whether bid item 5, well cylinders, and bid item 6, pump rods, should not have also been considered part of the integrated tower and windmill units. In this regard, we note that the IFB called for a quantity of 11 well cylinders, an amount equal to the sum of the two separate integrated tower and windmill units required by the IFB. In addition, the IFB specifically stated that the pump rods were to fit the well cylinders. Based on the above, it appears that, for purposes of the Buy American Act, the integrated units were (a) items 1, 3, and appropriate portions of items 5 and 6 and (b) items 2, 4, and the remaining portion of items 5 and 6.

FPR, 41 C.F.R. § 1-6.101(d) (1983), defines an end product manufactured in the United States as being a "domestic source" end product if the cost of its components which are mined, produced or manufactured in the United States exceeds 50 percent of the cost of all its components. The record shows that Essex's bid for the domestic-made towers

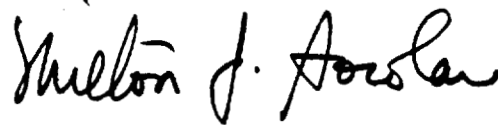
in bid item 2 was \$642 for each tower. In view of the fact that Essex's bid on the Argentine-made windmills (item 4) for these towers was \$610 each, we find that the company's bid on these six tower and windmill units was domestic. Therefore, since items 5 and 6 were domestic, at the most, the only portion of Essex's bid to which the 12-percent foreign bid differential was the five tower and windmill units of items 1 and 3 and the appropriate portions of items 5 and 6 combined.

Essex's bid on the 10-foot foreign-made windmills was nearly twice as much as the domestic-made towers. Based on our calculations, then, it appears that bid for those integrated was foreign, irrespective of the impact of domestic items 5 and 6.

The record shows that Essex's bid on bid items 1 and 3 combined was \$8,775. Applying the 12-percent foreign bid differential to this figure, an evaluation factor of \$1,053 should have been added to Essex's bid of \$19,875.54. This, in turn, would have made Essex's evaluated bid \$20,928.54, lower than the \$21,173.73 bid of Dean Bennett Supply Co., Inc. In addition, we find that because Essex's prices for bid items 5 and 6 represented only a small portion of the company's total bid, Essex's evaluated bid would still be low even if the 12-percent factor had been applied to the appropriate portions of bid items 5 and 6.

We sustain Essex's protest.

In view of the fact that the contract has been fully performed, we cannot recommend corrective action. Nevertheless, we recommend that in the future Interior specifically designate in the solicitation what the multi-line item integrated units are so that bidders may have a clear understanding of how the Buy American Act will be applied. As can be seen from our above discussion, the failure to designate what constitutes integrated units can readily result in different evaluated prices and/or different low bidders.

for 
Comptroller General
of the United States